UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:	)	
	)	**Chapter 11**
Montreal Maine & Atlantic Railway Ltd.,	)	**Case No. 13-10670**
	)	
Debtor.	)	
	)	
Wheeling & Lake Erie Railway Co.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Robert J. Keach, in his capacity as Chapter 11 Trustee of Montreal Maine & Atlantic Railway Ltd.; Montreal Maine & Atlantic Railway Ltd; LMS Acquisition Corp.; Montreal Maine & Atlantic Corp.; Travelers Property Casualty Company of America a/k/a Travelers Insurance Company,	)	**Adv. No. 13-01033**
	)	
Defendants.	)	

WHEELING & LAKE ERIE RAILWAY COMPANY'S REPLY BRIEF REGARDING THE APPLICABILITY AND ENFORCEABILITY OF THE COURT'S 2014 RULINGS DETERMINING THAT THE SO-CALLED CANADIAN RECEIVABLES ARE WHEELING'S COLLATERAL AND REQUEST FOR ASSESSMENT OF FEES AND COSTS, INCLUDING ATTORNEYS' FEES AGAINST THE TRUSTEE PURSUANT TO 28 U.S.C. § 1927

Now comes Wheeling & Lake Erie Railway Company ("Wheeling") and, pursuant to the Third Amended JPO[1], files this Reply to the Trustee's Brief In Support of Objection to Wheeling & Lake Erie Railway Company's Motion to Enforce Cash Collateral Orders (the "Trustee Brief") [D.E. # 63]. *See* Third Amended JPO, ¶ 5. The Trustee Brief provides the Court with absolutely no reason – be it procedural or substantive – to deviate from what Judge

[1] Defined terms shall have the same meanings as ascribed to them in Wheeling's Initial Brief Regarding the Applicability and Enforceability of the Court's 2014 Rulings Determining that the So-Called Canadian Receivables Are Wheeling's Collateral (the "Wheeling Brief") [D.E. # 65] unless otherwise noted herein.

Kornreich has already ruled twice, and which has already been finalized by the expiration of the right of appeal: (a) the Canadian Receivables are Wheeling's collateral as a matter of fact and law; and (b) this ruling is binding on the Trustee ***for all purposes***, including the pending Cash Collateral and Surcharge Motions. To make matters worse, the Trustee's Brief purports to repudiate the Stipulation made and entered into by virtue of the Third Amended JPO. There being nothing new in the Trustee's Brief, this Court having ruled twice that the Canadian Receivables to be Wheeling Collateral, and all appeal rights having terminated with respect to such rulings, this Court should, resist any effort to repudiate the Stipulation and enter an order granting Wheeling a superpriority, administrative expense claim in the amount of $695,640.93. In addition, the Court should enter its order imposing fees and costs, including Wheeling's legal fees and expenses, on the Trustee pursuant to 28 U.S.C. § 1927.

Argument

A. The Trustee Provides No Reason For the Court To Revisit the Ruling; Each and Every Argument Raised In the Trustee Brief Has Already Been Raised By the Trustee, Litigated Repeatedly, Explicitly Rejected By the Court, And Has Become Final By The Expiration Of Appeal Rights.

1. The Trustee Brief Simply Repeats Arguments That Have Already Been Considered and Rejected By the Court Twice.

In his Brief, the Trustee makes the ***exact arguments*** he made at the March 13 and May 8 Hearings and in the Rule 52 Motion. These exact arguments in turn were ***expressly rejected*** by the Court at the March 13 and May 8 Hearings and in the March 13 Findings, the Net Funds Order, the May 8 Findings and the Rule 52 Order. Thereafter, the Trustee filed an appeal with respect to these Orders, which appeal was subsequently dismissed at the Trustee's request after the Trustee and Wheeling settled the Rule 45G Motion.

The relevant point here is that ***all*** procedural steps that the Trustee might be permitted to take with respect to the issues at hand have already been taken and exhausted. There is no provision of any body of rules that permits the Trustee to seek further reconsideration of these matters following the conclusion of its appeal, particularly where the Trustee has nothing new to say.

2. The Trustee's Attempt to Again Revisit Already-Adjudicated Arguments Is Nothing More Than A Procedurally Improper Second, Post-Appeal, Rule 52(d) Motion to Alter or Amend.

Given that the Trustee advances no new arguments in the Trustee Brief, that pleading is, as a practical matter, nothing more than a post-appeal motion to alter or amend an otherwise final order of the Court. The Trustee cites no authority for the proposition that following the conclusion of an appeal, an acceptable or appropriate procedure is to go back to the trial court and seek reconsideration of the order(s) from which the appeal was taken. Of course, there is no such authority.

As such, the Trustee's Brief is little more than an ill-conceived and vexatious effort to multiply proceedings in this case so as to achieve some perceived tactical advantage over Wheeling, perhaps by increasing its costs. The Court should reject this effort, and has the tools to rectify the adverse effects of this conduct pursuant to 28 U.S.C. § 1927 (Wheeling addresses this in more detail below). In the meantime, it is important to demonstrate the disingenuousness of the Trustee's arguments in respect of the Canadian Receivables, and Wheeling's security interest therein.

3. The Ruling Has Collateral Estoppel Effect On the Trustee As to the Canadian Receivables.

The Trustee arguments that collateral estoppel does not apply do not withstand even superficial scrutiny. They can be summarized as follows:

First, the Trustee Brief suggests that there can be no *collateral estoppel* effect to the Ruling for purposes of the Cash Collateral Motion because the March 13 and May 8 Hearings involved different issues from those implicated in the Cash Collateral Motion. Trustee Motion, ¶¶ 22-24. This is a reformulation of the "prejudice" argument already heard and rejected by Judge Kornreich in 2014. Rule 52(d) Motion, ¶ 24[2]. As Judge Kornreich put it, in his usual inimitable style:

> ***As I caution[ed] the parties repeatedly, the findings and conclusions on that motion could have and would have a binding effect in other aspects of the case . . . .*** Which brings me to the fourth argument and the fact that the ruling on the 45g motion may be prejudicial to the debtor in other matters, specifically the motion that we are going to here now [the Cash Collateral Motion]. ***My answer to that is so be it***[1]. The Trustee's motion to reconsider on 52B is denied in all respects.

May 8 Findings Transcript, p. 49:6-14 (emphasis added).

Second, the Trustee argues that the ownership of the Canadian Receivables was not actually litigated. Trustee Motion, ¶¶ 25-27. This is simply a lightly repackaged version of the Trustee's arguments last year in the Rule 52(d) Motion that the evidence did not support Judge Kornreich findings as to the Canadian Receivables. Rule 52(d) Motion, ¶ 22-23[3]; *see* Wheeling Brief, ¶ 16. This argument too has already been rejected by Judge Kornreich because it is entirely unsupported by the record of the hearings, as Wheeling as pointed out (*See* Wheeling Brief, ¶¶ 16, 17). *E.g.*, May 8 Findings Transcript, p. 48:13-17 (Judge Kornreich "It appeared to me back in January and it appears to me today that … there were and are no Canadian Receivables [separate and distinct from the Debtor's receivables] . . . .").

---

[2] "In unnecessarily making the March 13 Findings, the Court has potentially prejudiced the Trustee with respect to other related matters before this Court, including the [Cash Collateral Motion]'".

[3] "The evidence on the record in this case . . . does not support the March 13 Findings."

Third, the Trustee alleges that a determination of ownership of the Canadian Receivables was not essential to the ruling on the 45G Motion. Trustee Brief, ¶¶ 28-30. Again, this issue was considered and explicitly rejected by the Court at May 8 Hearing and in the May 8 Findings. Rule 52(d) Motion, ¶ 24; *see* Wheeling Brief, ¶ 17.

Fourth, the Trustee argues that the Ruling violates the terms of the Protocol because the Ruling arguably implicates assets subject to the Canadian insolvency proceeding. Trustee Brief, ¶¶ 35-36. Judge Kornreich considered and explicitly rejected the Trustee's Protocol-based arguments last year. Rule 52(d) Motion, ¶ 25; *see* Wheeling Brief, ¶ 15.

A closer examination of each of these arguments shows that none of them has any merit, that each has already been rejected by this Court (twice), and that there is no reasonable grounds or basis for the Trustee to make these arguments again at this stage of the case.

A. *Trustee Contention: The Issue Now Presented Was Not Previously Before the Court.*

The Trustee begins by suggesting that the issue in dispute in the Cash Collateral Motion – ownership of the Canadian Receivables – was not before the Court during the March 13 and May 8 Hearing on the Rule 45G Motion. Trustee Brief, ¶¶ 22-24. This is an amazing position for the Trustee to take given that the Trustee and his counsel were the ones who put entitlement of the Canadian Receivables in play as part of their argument that Wheeling had no right to the 45G Net Funds. *See* Wheeling Brief, ¶ 17; May 8 Findings Transcript, p 27:1-2 (Judge Kornreich: "I agree with the Wheeling that it was the Trustee that put the question into play.") For the Trustee to argue that the issue he raised and litigated in the context of the 45G dispute – ownership of the Canadian Receivables – was somehow different from the issue raised and prosecuted by Wheeling in the Cash Collateral Motion – ownership of the Canadian Receivables – makes no sense. The Canadian Receivables are either collateral for Wheeling or

they are not; the Trustee cites no provision of any agreement or principle of law that would make Wheeling's security interests enforceable and perfected for some purposes but not for others[4]. As Judge Kornreich recognized, there is clearly "an identity of the issues" between the 45G contested matter and the Cash Collateral Motion such that application of collateral estoppel is warranted. *See Ganzalez-Pina v. Rodriguez*, 407 F.3d 425, 430 (1st Cir. 2005).

B. *Trustee Contention: The Ownership of the Canadian Receivables Was Not Actually Litigated.*

The Trustee also makes the puzzling argument that ownership of the Canadian Receivables was not actually litigated. Trustee Brief, ¶¶ 25-27. More specifically, the Trustee asserts that "No evidence was taken regarding the separate accounting and treatment of receivables because that issue was not before the Court" *Id.*, ¶ 26 (emphasis in original omitted). Wheeling begs to differ.

As set forth above and in the Wheeling Brief[5], the issue of the accounting and treatment of the Canadian Receivables was before the Court because those issues were part and parcel of the question of which entity owned those Receivables, an issue raised by the Trustee. Moreover, there was substantial evidence, in the form of live testimony on the "accounting and treatment of receivables" at the January 23 Hearing. Thus, Mr. Gardner, the Debtor's Chief Financial Officer, on direct and cross examination, testified as follows:

[4] Perhaps realizing the futility of this argument, the Trustee suggests that there could be some difference between the Canadian Receivables that generated the 45G Net Funds and the whole universe of Canadian Receivables at issue in the Cash Collateral Motion that would prevent application of collateral estoppel. Trustee Brief, ¶¶ 23-24. Tellingly, the Trustee does not say what that difference might be. The reason for this obvious: ***there is no difference, as the Court has already ruled***. None of the discovery undertaken in the context of the 45G litigation or the testimony provided at January 23 Hearing by the Debtor's CFO suggested that the subset of Canadian Receivables that generated the Net Funds was in any way different from the greater pool of Canadian Receivables. This argument is a text book example of an argument interposed for delay.

[5] And in Wheeling's Rule 52 Objection.

- While MMA Canada maintains its own currency accounts and books, MMA and MMA Canada operate on an integrated basis out of their Hermon, Maine headquarters. January 23 Hearing Transcript, pp. 84:11-13; 119.

- Canadian customers were billed for freight services (*i.e.*, services that would generate so-called "Canadian accounts receivable") via MMA invoices by MMA personnel; MMA Canada does not send out separate invoices for these services. *Id.*, pp. 119:16-120:20.

- Invoices sent by MMA to Canadian customers for freight services create accounts receivable for MMA and are booked as such on MMA's books, not MMA Canada's books. *Id.*, pp. 120:21-121:1.

- The same is true for interline settlement system ("ISS") invoices related to Canadian customers. *Id.*, pp. 121:2-122:21.

- Only MMA owns any rolling stock; MMA Canada does not own any rolling stock. *Id.*, p. 123:3-5.

- All of the cash generated by freight services, whether it be for U.S. or Canadian customers "all goes into one pot" at MMA. *Id.*, p. 124:3.

- On a periodic basis, MMA allocates a certain portion of accounts receivable proceeds to MMA Canada for tax purposes pursuant to an historical formula. *Id.*, pp. 123:11-124:2.

- That allocation of funds to MMA Canada is not tied to the amount of accounts receivable revenue generated by Canadian customers. *Id.*, pp. 123:25-124:3.

In light of Mr. Gardner's testimony on January 23rd, the Trustee's argument that no evidence was presented, and there is some yet-undisclosed evidence that will reverse the Ruling, is disingenuous at best. Moreover, as the Court itself noted at the May 8 Hearing in response to this same argument by the Trustee's counsel, "the time for evidence has passed." May 8 Findings Transcript, p. 20:6. If the Trustee had something more to say on the subject, his opportunity to do so was in the prior proceedings – proceedings in which he raised the subject.

The Trustee Brief also quotes language from a colloquy at the January 23 Hearing between the Court and Wheeling's counsel to suggest that they both acknowledged that the

evidence on treatment of the Canadian Receivables was lacking or somehow incomplete. Trustee Brief, ¶ 26. As Wheeling pointed out in its Rule 52 Objection (pp. 8-9), when that colloquy is read ***in its entirety*** (see January 23 Hearing Transcript, pp. 149:16-160:17), it becomes clear that Attorney Marcus was asserting that Wheeling had, based on the then, conclusive testimony of Mr. Gardiner, a perfected security interest in the Canadian Receivables[6] and that a ***separate*** motion to compel turnover of all of the Canadian Receivables to Wheeling would be forthcoming based on that testimony[7]. The Trustee knows full well that any suggestion of an incomplete record was made in reference to a yet-to-be-filed motion to compel turnover. Of course, the record for that motion – the forthcoming Cash Collateral Motion – was incomplete when the transcript was made, because that motion had not been filed. To distort this discussion of counsel and the Court as some kind of concession that there was a lack of evidence regarding entitlement to the Canadian Receivables, again, exceedingly disingenuous, at best. Certainly, Judge Kornreich twice rejected the notion that the record was incomplete.

The Trustee's assertion that the question of ownership of the Canadian Receivables was not litigated for collateral estoppel purposes simply does not pass the straight face test. As has been demonstrated repeatedly, the record is abundantly clear that the issue was litigated

---

[6] *See e.g.*, January 23 Hearing Transcript, p. 150:4-16 (emphasis added):

> MR. MARCUS: All right. The contention is, oh, half the money the Debtor got was from Canadian companies, so-called Canadian receivables. That's not Wheeling's money so they shouldn't get any benefit from it. Well, that's wrong. ***Those are Wheeling receivables because, as Mr. Garner testified, all of the billing of this company is billed by the Debtor***. Now, how they do allocations corporate-wise after they get the money is of no moment. When this company renders a service, whether it's in the United States or to a Canadian customer or to anybody else, that customer gets a bill from this Debtor. That creates this Debtor's account receivable. ***That is our collateral and that is the state of the evidence before the Court.***

[7] *See* May 8 Findings Transcript, p. 151:7, 19-20 (MR. MARCUS: "That's a fight for another day. . . It's an issue and the Court will be hearing more about it later.").

multiple times in multiple mediums: in pre-January 23 Hearing briefing, at the January 23 Hearing, in the parties' Rule 52 Motions, and during the May 8 Hearing.

C. *Trustee Contention: He Was Surprised by the Canadian Receivables Issue.*

The Trustee also suggests that "there was no reason for [him] to believe there was that he should litigate the issue [of the Canadian Receivables] at the January 23 Hearing" and he was somehow ambushed by the issue such that it would be unfair to apply collateral estoppel. Trustee Brief, ¶ 27. This statement, to put it as delicately as possible, is very far from the truth.

In fact, the Trustee himself, in his Trustee Brief Regarding 45G Tax Credits (the "Trustee 45G Brief") [D.E. # 578], which he filed ***two days before the January 23 Hearing***, expressly asserted that the Canadian Receivables were not Wheeling's collateral. *E.g.*, Trustee 45G Brief, ¶ 5 ("Wheeling did not take any steps to perfect a security interest in assets owned by MMA Canada. For the period from June 1, 2013 through December 31, 2013, approximately 52% of the cash collections by MMA and MMA Canada came from Canadian customers. In other words, a significant portion of the cash receipts during the relevant period came from collection of Canadian accounts in which Wheeling does not have a perfected security interest."), 22 ("The Qualified Expenditures were from a variety of sources, including sources in which Wheeling does not have a perfected security interest. For example, more than half of the Debtor's cash receipts from June 1, 2013 through December 31, 2013 were received from Canadian account debtors."). The Trustee 45G Brief went onto argue that "Wheeling could not claim a security interest in the Net Funds on the basis that they were 'proceeds' of pre-petition accounts because that argument "overlooks the fact that MMA funded the eligible expenditures from a variety of sources: . . . Canadian accounts receivable . . . ." *Id.*, p. 18. He also argued that the equities of the case barred Wheeling from asserting a security interest in the

Net Funds because "the Debtor funded the Qualified Expenditures from a variety of sources, including sources in which Wheeling does not have a security interest (*e.g.*, . . . proceeds of Canadian accounts receivable.)". *Id.*, p. 20.

For the Trustee to claim now that he was "surprised" by the issue of entitlement to the Canadian Receivables – when he himself raised that issue before any hearing was even held – casts substantial doubt on the sincerity and reasonableness of the Trustee's briefing in this case.

D. *Trustee Contention: The Ownership of the Canadian Receivables Was Not Essential to the Ruling in the 45G Motion.*

The Trustee also argues that ownership of the Canadian Receivables was not essential to the Ruling on the 45G Motion. Trustee Brief, ¶¶ 28-30. This argument is dealt with extensively in the Wheeling Brief (¶17) (and in the Rule 52 Opposition (pp. 6-9)) and does not need to be revisited in detail again here.

That being said, Wheeling is still at a loss to understand how the Trustee could first argue to Judge Kornreich that Wheeling was not entitled to the Net Funds under an "equities of the case" defense premised in large part on a claim that the proceeds of the Canadian Receivables that generated those Funds were not Wheeling collateral, and now argue that Judge Kornreich did not need to decide that issue in the context of rejecting that Trustee-asserted "equities of the case" defense. There is no way to reconcile these positions because, as should be obvious by this point, the Trustee is clearly contradicting himself. Plainly, adjudication of Wheeling's security interest in the Canadian Receivables ownership was central to the claims and defenses made by the parties, and to the Ruling. The Trustee himself made it so.

E. *Trustee Contention: The Ruling Runs Afoul of the Protocol.*

The Trustee's final argument is that the Ruling runs afoul of the Protocol and therefore cannot be valid and binding. Trustee Brief, ¶¶ 31-38. Like all his other arguments, this one also

fails. The Trustee Brief quotes ¶ 5(B) of the Protocol to suggest that Judge Kornreich and/or Wheeling erred in not asking for a joint hearing. *Id.*, ¶ 32. This argument ignores the actual language of ¶ 5(b) which reads as follows:

> Where an issue is to be addressed only to one Court, in rendering a determination in any cross-border matter, such Court ***may***: (a) ***to the extent*** practical or ***advisable***, consult with the other Court; and (b) in its sole discretion and bearing in mind the principles of comity, either (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part to the other Court; or (iii) seek a joint hearing of both Courts.

(Emphasis added). The language above in bold typeface is important as it vests in this Court the discretion (hence the term "may") to decide ***on its own*** (if "advisable") whether or not to consult with the Canadian Court on potential cross-border issues. It does not require this Court to engage in such consultation. Further, the Trustee omits quotation of those portions of the Protocol that expressly reserve to the Bankruptcy Court the unfettered right to exercise its lawful jurisdiction: "The approval and implementation of this Protocol shall ***not divest nor diminish the U.S. Court's . . . independent jurisdiction*** over the subject matter of the U.S. Proceeding . . . ." Protocol, § C.6 (emphasis added). "The U.S. Court shall have ***sole and exclusive jurisdiction*** and power over the conduct of the U.S. Proceedings and the hearing and determination of matters arising in the U.S. Proceedings." *Id, §* C.7 (emphasis added).

Judge Kornreich made it very clear in the May 8 Findings that he did not see any need to invoke the Protocol because (a) he retained exclusive jurisdiction over the Debtor's assets, which include the Canadian Receivables; and (b) in any event, the Trustee, the MMA Canada Monitor and MMA Canada itself had every right to see invoke the Protocol themselves as to the 45G issues, but they chose not to do so. *See* Wheeling Brief, ¶ 15; May 8 Findings Transcript, p. 45:12-46:9. Since the Canadian debtors elected not to become involved in the matter, Judge

Kornreich was well within his discretionary authority to proceed without them. The Trustee Brief, which conveniently omits those portions of the Protocol they wish this Court to overlook, as well as the Canadian debtors' own decision to waive participation, provides no basis for the Court to overturn its earlier ruling on the scope of its own jurisdiction under 11 U.S.C. § 1334.

D. 11 U.S.C. § 502(d) Does Not Bar Immediate Payment of Wheeling's Allowed, Superpriority Administrative Claim; The Trustee's Arguments to the Contrary Are Essentially a Repudiation of the Stipulations Agreed to And Entered in the Third Amended PTO.

The Trustee argues that if this Court determines that the Ruling is binding and applicable to the Cash Collateral Motion (of course, it is), then 11 U.S.C. § 502(d) bars Wheeling from having an allowed $695,640.93 superpriority, administrative claim, until such time as the newly-filed Preference Action (as that term is defined in the Trustee Brief) is resolved. Trustee Brief, ¶¶ 39-42. The merits of this argument are addressed below, but at the outset, it must be rejected because the Trustee has already stipulated in this case that if the Canadian Receivables are Wheeling collateral, that is, if the Court's prior rulings remain in full force and effect and binding on the Trustee, then Wheeling has an allowed, superpriority claim of $695,640.93. Here is the text of the current Stipulation, as approved by this Court and under which the parties are now operating:

> If the Court determines as matter of law and fact that Ruling is binding on the Trustee for purposes of the Cash Collateral Motion, ***then Wheeling shall be deemed to have a superpriority, administrative expenses claim in this case, as provided for by the terms of the applicable cash collateral orders***, in the amount of $695,640.93.

Third Amended Joint PTO, ¶ 3.A (emphasis added). Raising the 502(d) issue now is yet another questionable litigation tactic by the Trustee. By stating a § 502(d) argument, which expressly contemplates "disallowance" of Wheeling's superpriority administrative claim, the Trustee is repudiating the Stipulation negotiated with Wheeling, and approved by this Court.

This is because the Stipulation contains no qualification or limitation based on Section 502(d), although the Trustee could well have sought that. Indeed, it is clear that the Trustee knew about his avoidance claims against Wheeling before he entered into the Stipulation, as evidenced by, *inter alia*, the March 20, 2015, demand letter from the Trustee to Wheeling as attached hereto as ***Exhibit A***. This demand letter precedes the Stipulation by over six weeks. The Trustee's current efforts to repudiate the Stipulation should not be countenanced. Moreover, as demonstrated below, the contention asserted by the Trustee lacks merit as a matter of law.

While the First Circuit has not ruled on whether § 502(d) applies to administrative claims, the majority rule from other Circuits, including the Second Circuit, is that it ***does not apply***. *ASM Capital, LP v. Ames Dep't Stores, Inc., (In re Ames Dep't Stores),* 582 F.3d 422 (2d Cir.2009); *In re Momenta, Inc.*, 455 B.R. 353, 361-62 (Bankr. D.N.H. 2011); *In re Plastech Engineered Prods., Inc.*, 394 B.R. 147 (Bankr. E.D.Mich, 2008); *In re Roberds, Inc.*, 315 B.R. 443 (Bankr.S.D.Ohio 2004); *In re Durango Georgia Paper Co.*, 297 B.R. 326 (Bankr. S.D. Ga. 2003); *In re CM Holdings, Inc.*, 264 B.R. 141 (Bankr.D.Del.2000).

The minority position holds that § 502(d) applies to all claims, including administrative expenses. *In re MicroAge, Inc.*, 291 B.R. 503 (9th Cir. BAP 2002); *In re Circuit City Stores, Inc.*, 426 B.R. 560 (Bankr.E.D.Va. 2010).

There is no reason why the Court should decline to follow the majority rule – one adopted by New Hampshire Bankruptcy Judge Deasy in the *Momenta* case, 455 B.R. at 362 – that § 502(d) does not bar immediate payment of administrative expenses. As the *Momenta* decision notes "[a]llowance of administrative expenses and allowances of claims are separate distinct mechanisms. . . Section 503, titled allowance of administrative expenses, stands alone." *Id.* Accordingly, it is entirely appropriate that § 502(d), which is "used to disallow claims filed

under § 501 and allowed under § 502(d)," does not apply to administrative expenses requests, which "stand alone: in their own statutory silo." *Id.* "To construe § 502(d)'s disallowance as applicable to expenses allowable under § 503 – a section with its own scope, purpose and conditions – is to expand the scope of § 502(d)'s disallowance beyond its plain meaning." *Durango*, 297 B.R. at 330.

This is especially true in the context of this case, where Wheeling's superpriority administrative claim arose by virtue of multiple negotiated, consented-to, and judicially-approved Cash Collateral Orders. None of these Cash Collateral Orders limit or condition Wheeling's superpriority claim based upon any avoidance action or other causes of action that the Trustee might have brought. At the same time, the Cash Collateral Orders expressly reserved the Trustee's rights to bring these actions against Wheeling – there is no waiver or release. If the Trustee or the Court wanted to limit the superpriority claim by assertion of a § 502(d) limitation, particularly in view of his reservation of rights to file avoidance actions, then this limitation could have been and should have been incorporated in the Cash Collateral Orders – just like it should have been incorporated into the Stipulation if the Trustee wanted to reserve these rights. To suggest that such a limitation should be read in now, after the Trustee has utilized Wheeling Cash Collateral to achieve his objectives in this case and in derogation of the recently agreed upon Stipulation, is entirely inappropriate, unreasonable and unfair.

E. The Present Case Is A Proper Case For Fee Shifting Pursuant to 11 U.S.C. § 1927 Because Of The Trustee's Vexatious and Unreasonable Conduct; The Court Should Order The Trustee To Pay All Of Wheeling's Attorneys' Fees and Expenses In These Proceedings Related to Enforcement Of The Court's Cash Collateral Orders.

As pointed out above, the assertions of the Trustee in the Trustee Brief are nothing short of astounding, given the record of this case. The arguments made in support of the idea that prior

rulings of this Court are not binding on the Trustee are entirely disingenuous – the Trustee knows better; he has been told this twice, and then filed an appeal, subsequently dismissed. To make matters worse, the Trustee attempts to repudiate the Stipulation he entered into with Wheeling by arguing in the Trustee Brief, after the Stipulation has been signed, that even if the Canadian Receivables are Wheeling's collateral, Wheeling is nevertheless not entitled to a superpriority administrative claim, contrary to the express terms of the Stipulation.

One struggles to understand the motivation for making these arguments and for repudiating the Stipulation, other than simply to harass Wheeling, or gain some perceived tactical advantage from forcing it to incur the costs of response. This is entirely inappropriate and it should not be countenanced by this Court. Federal law provides a remedy: 28 U.S.C. § 1927. This section provides as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

"Section 1927 was intended by Congress to deter unnecessary delays in litigation . . . . It looks to unreasonable and vexatious multiplications of proceedings; and it imposes an obligation on attorneys throughout the entire litigation to avoid dilatory tactics." *In re Goldstein*, 201 B.R. 1, 8 (Bankr. D. Me. 1996) (citations and quotations omitted). Further, Section 1927 is the tool available to federal courts to effectuate a change of the "American Rule" such that fee shifting can be ordered where circumstances warrant it. *See Matter of Maurice*, 69 F.3d 830, 834 (7th Cir. 1995); *Rey v. Vertrue Inc.*, 1:12 CV 10146, 2013 WL 4718764, at *7 (N.D. Ill. Sept. 3, 2013); *State of N.J. Dept. of Envtl. Protec. v. Gloucester Envtl. Mgt. Services, Inc.*, 138 F.R.D. 421, 435 (D.N.J. 1991); *In re Loyd*, 304 B.R. 372, 375

(9th Cir. B.A.P. 2003); *In re Pastran*, 462 B.R. 201, 208 (Bankr. N.D. Tex. 2011); *In re Sowers*, 97 B.R. 480, 484 (Bankr. N.D. Ind. 1989) (noting that § 1927 is a "fee shifting" statute).

The First Circuit has had recent occasion to discuss Section 1927, and confirmed its availability to assess fees and costs against a party or an attorney who violates its proscription. As described by the First Circuit in *Jensen v. Phillips Screw Co.*, 546 F.3d 59, 64 (1st. Cir. 2008) the circumstances that will warrant sanctions under Section 1927 include the following:

> "Garden-variety carelessness or even incompetence, without more, will not suffice to ground the imposition of sanctions under section 1927. Rather, an attorney's actions must evince a studied disregard of the need for an orderly judicial process, *see Jolly Group*, 435 F.3d at 720, or add up to a reckless breach of the lawyer's obligations as an officer of the court,*see Salkil*, 458 F.3d at 532; *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir.1987). Bad faith is not an essential element, but a finding of bad faith is usuallya telltale indicium of sanctionable conduct. *See, e.g., FDIC v. Conner*, 20 F.3d 1376, 1385 (5th Cir.1994);*Cruz*, 896 F.2d at 631".

Here, we have a studied and repeated disregard of the need for an orderly judicial process. After a long procedural history, the Trustee finally entered into a Stipulation that Wheeling was entitled to a superpriority administrative claim, subject to one exception only: a determination that prior orders of the Court holding that Wheeling had a valid and enforceable security interest in the Canadian Receivables were binding on the Trustee. If the Trustee had something new to say on the subject, he was free to present it in the Trustee Brief, but all Wheeling and the Court got was a rehash of arguments that had previously been rejected – twice. Litigation conduct qualifies as "vexatious" if it is "harassing or annoying, regardless of whether it is intended to be so." *Cruz v. Savage*, 896 F.2d 626, 632 (1st Cir. 1990).

It is hard to imagine a more paradigmatic example of a "studied disregard of the need for an orderly judicial process" than the Trustee's Brief, and, indeed, the entire litigation history of the Cash Collateral Motion. That multiplication has occurred in several ways: First,

although the Trustee, after considerable procedural wrangling, has entered into the Stipulation with Wheeling (a Stipulation that could have been and should have been entered into months ago), the Trustee has now attempted to repudiate the Stipulation, by adding new conditions and objections to allowance of Wheeling's superpriority administrative claims. Second, if the Stipulation is to be honored to the letter, then it should also be honored in its spirit – the Trustee should not be free to impose unreasonable costs and expenses on Wheeling to rebut, for the third time, defenses that have already been heard, determined, and rejected by this Court twice before.

Third, the Trustee's repudiation of the Stipulation comes after a long list of prior steps in this case, all of which have come at considerable, and clearly unnecessary, expense:

Main Bankruptcy Case

- Multiple Depositions of Donald Gardner;
- Cash Collateral Motion;
- February 7, 2014 status conference regarding Cash Collateral Motion;
- Trustee's Opposition to Cash Collateral Motion [D.E. # 707];
- Joint Motion and Amended Joint Motion to Continue and Reschedule Hearing on, *inter alia*, Cash Collateral Motion [D.E. ## 717, 719];
- Proposed Scheduling Order as to Cash Collateral Motion [D.E. # 792];
- Scheduling Order as to Cash Collateral Motion [D.E. #794];
- Wheeling's Witness & Exhibit List for Hearing on Cash Collateral Motion [D.E. # 843];
- Wheeling's Supplemental Brief in Support of Cash Collateral Motion [D.E. # 845];
- Wheeling's Request for Telephonic Hearing on Cash Collateral Motion-related discovery dispute [D.E. # 932];
- June 6, 2014 hearing on Cash Collateral Motion-related discovery dispute;
- June 24, 2014 hearing on, *inter alia*, Cash Collateral Motion;

Wheeling v. Keach Adversary Proceeding

- Joint Pretrial Scheduling Order [D.E. # 32];
- Consent Motion to Continue Hearing and to Extend Related Deadlines [D.E. # 38];
- Order Granting Consent Motion to Continue Hearing and to Extend Related Deadlines [D.E. # 40];
- Scheduling Conference conducted on March 2, 2015;
- Notice of Hearing [D.E. # 45];

- Wheeling Notice of 30(b)(6) deposition of Trustee [*see* D.E. # 46];
- March 24, 2015 Deposition of Frederick Caruso, the Trustee's 30(b)(6) designee;
- Proposed Amended Joint Pretrial Order [D.E. # 47];
- Amended Pretrial Scheduling Order [D.E. # 48];
- Notice of Status Conference [D.E. # 51];
- Proposed Second Amended Joint Pretrial Order [D.E. # 52];
- Second Amended Joint Pretrial Order [D.E. # 53];
- April 29, 2105 status conference;
- Proposed Third Amended Joint Pretrial Order [D.E. # 60];
- Third Amended Joint Pretrial Order [D.E. # 61];
- Trustee Brief;
- Wheeling Brief.

Simply put, if the Trustee honored the Stipulation, such that Wheeling and the Court did not need to respond to his disingenuous efforts to strip it away and/or undermine it with wholly meritless and unreasonable arguments, Wheeling and the Estate would have saved significant money and time and use of the Court's valuable resources would have been minimized. *See e.g., In re Eve Marie, Inc.* 15 F.3d 1084 at *2 (9th Cir. 1993) (affirming sanction for filing of second motion to reconsider that "asserted no new facts or legal theories . . . the district court correctly found that no justification existed for the second filing, and that it constituted an unreasonable and vexatious multiplication of the proceeding."); *Greco v. Troy Corp.*, 952 F.2d 406 at *1 (9th Cir. 1991); *Baker Industries, Inc. v. Cerberus Ltd.,* 764 F.2d 204 (3d Cir.1985) (affirming award of award of attorneys' fees under 28 U.S.C. § 1927 where litigant filed objections to finding of referee after *stipulating* that referee's decisions would not be appealable); *In re Prosser*, 06-30009, 2011 WL 6440879, at *50 (Bankr. D.V.I. Dec. 20, 2011) ("Once a matter is decided the proper avenue to raise errors in the decision is an appeal. ***Continual requests for reconsideration or efforts to adjudicate the same allegations in multiple proceedings are not appropriate and are within the purview of 28 U.S.C. § 1927*** regarding counsel's liability for excessive costs where counsel multiplies proceedings

unreasonably and vexatiously.") (emphasis added); *see also Kapco Mfg. Co., Inc. v. C&O Enterprises, Inc.*, 886 F.2d 1485, 1492-93 (7th Cir. 1989).

It is fitting and appropriate for the Court to assess upon the Trustee the excess and avoidable costs that have been imposed upon Wheeling by virtue of his unreasonable and vexatious conduct. Section 1927 and applicable First Circuit jurisprudence provides vehicle to do so. *Id.*

WHEREFORE, Wheeling respectfully requests that the Court enter an Order:

A. Rejecting the request of the Trustee to relitigate (for the third time) the issue of whether the Canadian Receivables are collateral for Wheeling;

B. Ordering, pursuant to the Third Amended JPO, that Wheeling holds a valid and enforceable superpriority administrative claim, in the amount of $695,640.93, and that such claim has priority over all other administrative claims in this Chapter 11 case;

C. Assessing the Trustee with Wheeling's costs and expenses, including legal fees, of litigating the Cash Collateral Motion to date; and

D. Granting such other relief as the Court deems just and appropriate.

Dated: June 9, 2015

/s/ George J. Marcus
George J. Marcus
David C. Johnson
Andrew C. Helman

Counsel for Wheeling & Lake Erie Railway Company

MARCUS, CLEGG & MISTRETTA, P.A.
One Canal Plaza, Suite 600
Portland, ME 04101
207.828.8000

CERTIFICATE OF SERVICE

I, Holly C. Pelkey, hereby certify that I am over eighteen years old and that I caused a true and correct copy of the above document to be served upon the parties electronically at the addresses set forth on the Service List set forth below on 9th day of June, 2015.

/s/ Holly C. Pelkey
Holly C. Pelkey
Legal Assistant

Mailing Information for Case 13-10670

Electronic Mail Notice List

- D. Sam Anderson sanderson@bernsteinshur.com, acummings@bernsteinshur.com;astewart@bernsteinshur.com;kquirk@bernsteinshur.com;kbigelow@bernsteinshur.com
- Darcie P.L. Beaudin dbeaudin@sta-law.com, jlhommedieu@sta-law.com;mleblond@sta-law.com
- Fred W. Bopp III, fbopp@perkinsthompson.com, lweliver@perkinsthompson.com;sdoil@perkinsthompson.com;mnelson@perkinsthompson.com
- Aaron P. Burns aburns@pearcedow.com, rpearce@pearcedow.com;katwood@pearcedow.com
- Richard Paul Campbell rpcampbell@campbell-trial-lawyers.com, mmichitson@campbell-trial-lawyers.com
- Roger A. Clement, Jr. rclement@verrilldana.com, nhull@verrilldana.com;bankr@verrilldana.com
- Daniel C. Cohn dcohn@murthalaw.com
- Steven E. Cope scope@copelegal.com, copefilings@copelegal.com;copefilings@gmail.com;copefilings@ecf.inforuptcy.com
- Maire Bridin Corcoran Ragozzine acummings@bernsteinshur.com
- Kevin J. Crosman kevin.crosman@maine.gov
- Keith J. Cunningham kcunningham@pierceatwood.com, mpottle@pierceatwood.com;rkelley@pierceatwood.com
- Debra A. Dandeneau debra.dandeneau@weil.com, elizabeth.hendee@weil.com;jessica.diab@weil.com;Blaire.Cahn@weil.com
- Roma N. Desai rdesai@bernsteinshur.com, acummings@bernsteinshur.com;kquirk@bernsteinshur.com;astewart@bernsteinshur.com
- Joshua R. Dow jdow@pearcedow.com, rpearce@pearcedow.com;katwood@pearcedow.com
- John Eggum jeggum@fgppr.com, rramirez@fgppr.com
- Daniel R. Felkel dfelkel@troubhheisler.com

- Jeremy R. Fischer jfischer@dwmlaw.com, hwhite@dwmlaw.com;astead@dwmlaw.com
- Isaiah A. Fishman ifishman@krasnowsaunders.com
- Peter J. Flowers pjf@meyers-flowers.com
- Christopher Fong christopherfong@paulhastings.com
- Taruna Garg tgarg@murthalaw.com, kpatten@murthalaw.com
- Jay S. Geller jgeller@jaysgellerlaw.com
- Craig Goldblatt craig.goldblatt@wilmerhale.com
- Frank J. Guadagnino fguadagnino@clarkhillthorpreed.com, aporter@clarkhill.com
- Susan N.K. Gummow sgummow@fgppr.com, rramirez@fgppr.com
- Michael F. Hahn mhahn@eatonpeabody.com, clavertu@eatonpeabody.com;dcroizier@eatonpeabody.com;jmiller@eatonpeabody.com;dgerry@eatonpeabody.com
- Regan M. Haines rhaines@curtisthaxter.com, jwashburn@curtisthaxter.com
- Andrew Helman ahelman@mcm-law.com, bankruptcy@mcm-law.com
- Paul Joseph Hemming phemming@briggs.com, pkringen@briggs.com
- Brian T. Henebry bhenebry@carmodylaw.com
- Seth S. Holbrook holbrook_murphy@msn.com
- Nathaniel R. Hull nhull@verrilldana.com, bankr@verrilldana.com
- David C. Johnson bankruptcy@mcm-law.com, djohnson@mcm-law.com
- Elizabeth Thorne Jozefowicz ejozefowicz@clausen.com
- Jordan M. Kaplan jkaplan@zwerdling.com, mwolly@zwerdling.com
- Robert J. Keach rkeach@bernsteinshur.com, acummings@bernsteinshur.com;astewart@bernsteinshur.com;kquirk@bernsteinshur.com
- Curtis E. Kimball ckimball@rudman-winchell.com, jphair@rudman-winchell.com;cderrah@rudmanwinchell.com
- Andrew J. Kull akull@mittelasen.com, ktrogner@mittelasen.com
- George W. Kurr gwkurr@grossminsky.com, tmseymour@grossminsky.com;kclove@grossminsky.com
- Alan R. Lepene Alan.Lepene@ThompsonHine.com
- Jessica Ann Lewis Jessica@molleurlaw.com, martine@molleurlaw.com;dawn@molleurlaw.com;Tanya@molleurlaw.com;jim@molleurlaw.com;barry@molleurlaw.com;jen@molleurlaw.com;all@molleurlaw.com;kati@molleurlaw.com;andy@molleurlaw.com
- Matthew E. Linder mlinder@sidley.com, efilingnotice@sidley.com;tlabuda@sidley.com;jsteen@sidley.com
- Edward MacColl emaccoll@thomport.com, bbowman@thomport.com;jhuot@thomport.com;eakers@thomport.com
- Benjamin E. Marcus bmarcus@dwmlaw.com, hwhite@dwmlaw.com;dsoucy@dwmlaw.com
- George J. Marcus bankruptcy@mcm-law.com
- Michael K. Martin mmartin@pmhlegal.com, bkeith@pmhlegal.com,kwatson@pmhlegal.com
- Patrick C. Maxcy patrick.maxcy@dentons.com
- John R McDonald jmcdonald@briggs.com, mjacobson@briggs.com

- Kelly McDonald kmcdonald@mpmlaw.com, kwillette@mpmlaw.com
- Paul McDonald pmcdonald@bernsteinshur.com, jsmith@bernsteinshur.com;astewart@bernsteinshur.com
- Timothy J. McKeon tmckeon@bernsteinshur.com, kquirk@bernsteinshur.com;astewart@bernsteinshur.com;kbigelow@bernsteinshur.com
- James F. Molleur jim@molleurlaw.com, all@molleurlaw.com;tanya@molleurlaw.com;jen@molleurlaw.com;barry@molleurlaw.com;kati@molleurlaw.com;martine@molleurlaw.com;Jessica@molleurlaw.com;andy@molleurlaw.com
- Ronald Stephen Louis Molteni moltenir@stb.dot.gov
- Frederick C. Moore frederick.moore@libertymutual.com, tammy.chianese@libertymutual.com
- Dennis L. Morgan dmorgan@coopercargillchant.com, hplourde@coopercargillchant.com
- Stephen G. Morrell stephen.g.morrell@usdoj.gov
- Kameron W. Murphy kmurphy@tuethkeeney.com, gcasey@tuethkeeney.com
- Timothy H. Norton tnorton@krz.com, mhansen@krz.com
- Office of U.S. Trustee ustpregion01.po.ecf@usdoj.gov
- Richard P. Olson rolson@perkinsolson.com, jmoran@perkinsolson.com;lkubiak@perkinsolson.com
- Adam Paul adam.paul@kirkland.com
- Jeffrey T. Piampiano jpiampiano@dwmlaw.com, hwhite@dwmlaw.com;astead@dwmlaw.com
- Jennifer H. Pincus Jennifer.H.Pincus@usdoj.gov
- William C. Price wprice@clarkhill.com, aporter@clarkhill.com
- Tracie J. Renfroe trenfroe@kslaw.com
- Adam J. Shub ashub@preti.com, lcopeland@preti.com;amanhart@preti.com
- Elizabeth L. Slaby bslaby@clarkhill.com, aporter@clarkhill.com
- F. Bruce Sleeper bankruptcy@jbgh.com
- Renee D. Smith renee.smith@kirkland.com, kimberly.davenport@kirkland.com;cassandra.milleville@kirkland.com;molly.boyd@kirkland.com;katie.trucco@kirkland.com;luke.madson@kirkland.com
- Deborah L. Thorne deborah.thorne@btlaw.com
- Timothy R. Thornton pvolk@briggs.com
- Mitchell A. Toups matoups@wgttlaw.com, jgordon@wgttlaw.com
- Matthew Jordan Troy matthew.Troy@usdoj.gov
- Jason C. Webster jwebster@thewebsterlawfirm.com, dgarcia@thewebsterlawfirm.com;hvicknair@thewebsterlawfirm.com
- William H. Welte wwelte@weltelaw.com
- Elizabeth J. Wyman liz.wyman@maine.gov, eve.fitzgerald@maine.gov
- Lindsay K. Zahradka lzahradka@bernsteinshur.com, acummings@bernsteinshur.com;astewart@bernsteinshur.com;kquirk@bernsteinshur.com

EXHIBIT A

207 774-1200 main
207 774-1127 facsimile
bernsteinshur.com

BERNSTEIN SHUR
COUNSELORS AT LAW

100 Middle Street
PO Box 9729
Portland, Maine 04104-5029

D. Sam Anderson
(207) 228-7178 direct
sanderson@bernsteinshur.com

March 20, 2015

George J. Marcus, Esquire
Counsel to Wheeling & Lake Erie Railway
MARCUS, CLEGG & MISTRETTA, P.A.
One Canal Plaza, Suite 600
Portland, ME 04101

BY ELECTRONIC MAIL

Re: Demand against Wheeling & Lake Erie Railway arising out of transfers made by Montreal Maine & Atlantic Railway Ltd. to Wheeling & Lake Erie Railway

Dear George:

As you are aware, on August 7, 2013, Montreal Maine & Atlantic Railway Ltd. ("MMA") filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code. On August 21, 2013, Robert J. Keach, Esquire was appointed as the trustee (the "Trustee") to administer MMA's bankruptcy case. This letter is to inform you of preferential payments, your client, Wheeling & Lake Erie Railway ("W&LE"), received pursuant to the Bankruptcy Code and/or the Uniform Fraudulent Transfer Act ("UFTA"), and to begin the process of resolving issues relating to these transfers.

First, in relation to the preference issues under the Bankruptcy Code, MMA's books and records reveal that W&LE received **$1,924,560.41** in payments from MMA between August 8, 2012 and August 7, 2013. A list of those payments is set forth on **Exhibit A** enclosed herewith (the transfers set forth on Exhibit A hereinafter, the "Transfers").

The Trustee has reviewed the Transfers and believes that they may constitute preferential payments that the Trustee is entitled to avoid and recover from W&LE under sections 547(b) and 550(a) of the Bankruptcy Code. Pursuant to § 547(b)(4)(B) of the Bankruptcy Code, the one year look-back period applicable to "insiders" applies to payments MMA made to W&LE because W&LE is an "insider" of MMA. Larry R. Parsons ("Mr. Parsons") is the Chief Executive Officer of W&LE, in addition to being the Chairman of its Board of Directors and its majority stockholder. Mr. Parsons was, at all relevant times, a director of MMA, as well as a stockholder of MMA. Additionally,

W&LE was a major stockholder of MMA, through its subsidiary, ABC Railway, Inc. Finally, Edward Burkhardt, the Chairman of MMA's Board of Directors, is or was at all relevant times a member of W&LE's Board of Directors.

Additionally, because W&LE's claim against MMA was only partially secured by MMA's assets, payments MMA made to W&LE during the preference period are presumed to be credited first against the unsecured portion of the debt. See Gray v. A.I. Cred. Corp. (In re Paris Indus. Corp., 130 B.R. 1, 4 (Bankr. D. Me. 1991). Further, the Trustee has analyzed the Transfers in light of the new value exception, as applied by Maine Bankruptcy Courts. See Leathers v. Prime Leather Finishes Co., 40 B.R. 248 (D. Me. 1984). Taking into account the new value exception, it is the Trustee's position that **$1,899,309.37** of the payments resulting from the Transfers are recoverable by the Trustee as preferential payments.

Second, in relation to the UFTA claims, MMA's books and records reveal that on or about January 4, 2011, W&LE received a payment of **$2,708,912.20** in connection with MMA's sale of certain of its rail lines to the State of Maine (the "2011 Sale"), and MMA's workout of its senior credit facility with the Federal Railroad Administration (the "FRA"). Pursuant to UFTA, a "transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider on account of antecedent debt, the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent." UFTA § 5(b). As explained above, W&LE is an insider of MMA. At the time of the 2011 Sale, W&LE's outstanding line of credit to MMA constituted an antecedent debt; W&LE's line of credit was also significantly undersecured. MMA was insolvent at all times relevant hereto, both on a balance sheet basis and on the basis that MMA was unable to pay its debts as they came due. Finally, due to Mr. Parsons's position on the Board of Directors of MMA, he and W&LE had reasonable cause to believe that the debtor was insolvent. Accordingly, the $2,708,912.20 payment MMA made to W&LE within the 2011 Sale is recoverable by the Trustee as an insider preference under UFTA.

If your client fails to accept liability as proposed herein, or if a settlement is not otherwise achieved, within 20 days of the date hereof, the Trustee will immediately commence legal action to collect the amounts owed.

We look forward to your prompt response, and to resolving this matter quickly and fairly. Please do not hesitate to contact me if you have questions or concerns.

Sincerely,

by: MAS

Sam Anderson
Counsel to Robert J. Keach, Chapter 11 Trustee

cc: Development Specialists, Inc. (via Electronic Mail)
Robert J. Keach, Chapter 11 Trustee

Exhibit A

Case: Montreal Maine & Atlantic Ltd.
Preference Period: (8/8/2012 - 8/7/2013)
Vendor: Wheeling & Lake Erie

#	Dates of Payments/ Open Invoices	Check No.	Check Amount	Amount Paid or Value of Transfers	Invoice Date	Invoice No.	Invoice Amount	New Value/ Open Invoice Amount	Check Clear Date	No. of Days	Net Preference	OCB Analysis
1	8/16/2012	900997	24,346.88	24,346.88	7/31/2012	1207	24,346.88	-	8/16/2012	16	24,346.88	-
2	9/17/2012	901038	24,638.54	24,638.54	8/31/2012	120831	24,638.54	-	9/17/2012	17	48,985.42	-
3	10/15/2012	901080	25,156.25	25,156.25	9/30/2012	1209	25,156.25	-	10/15/2012	15	74,141.67	-
4	11/19/2012	901128	27,044.79	27,044.79	10/31/2012	1210	27,044.79	-	11/19/2012	19	101,186.46	-
5	12/17/2012	901152	26,250.00	26,250.00	11/30/2012	1211	26,250.00	-	12/17/2012	17	127,436.46	-
6	1/7/2013	901198	500,000.00	500,000.00	1/7/2013	CK90119801	500,000.00	-	1/7/2013	0	627,436.46	-
7	1/10/2013	901196	500,000.00	500,000.00	1/10/2013	CK90119601	500,000.00	-	1/10/2013	0	1,127,436.46	-
8	1/15/2013	901192	27,125.00	27,125.00	12/31/2012	1212	27,125.00	-	1/15/2013	15	1,154,561.46	-
9	2/15/2013	901253	23,697.92	23,697.92	1/31/2013	1301	23,697.92	-	2/15/2013	15	1,178,259.38	-
10	2/19/2013	901266	200,000.00	200,000.00	2/19/2013	CK90126601	200,000.00	-	2/19/2013	0	1,378,259.38	-
11	3/18/2013	901288	20,708.33	20,708.33	2/28/2013	1302	20,708.33	-	3/18/2013	18	1,398,967.71	-
12	4/16/2013	901326	24,820.83	24,820.83	3/31/2013	1303	24,820.83	-	4/16/2013	16	1,423,788.54	-
13	5/7/2013	901362	300,000.00	300,000.00	5/7/2013	CK90136201	300,000.00	-	5/7/2013	0	1,723,788.54	-
14	5/15/2013	901374	25,520.83	25,520.83	4/30/2013	1304	25,520.83	-	5/15/2013	15	1,749,309.37	-
15	5/17/2013	901367	150,000.00	150,000.00	5/17/2013	CK90136701	150,000.00	-	5/17/2013	0	1,899,309.37	-
16	6/17/2013	901413	25,251.04	25,251.04	5/31/2013	1305	25,251.04	-	6/17/2013	17	1,924,560.41	-
17	6/30/2013				6/30/2013	1306	25,156.25	(25,156.25)		n/a	1,899,404.16	-
18	7/31/2013				7/31/2013	1307B	26,899.01	(26,899.01)		n/a	1,899,309.37	-
19	8/6/2013				8/6/2013	1308B	5,206.26	(5,206.26)		n/a	1,899,309.37	-
				$ 1,924,560.41			**$ 1,981,821.93**	**$ (57,261.52)**			**$ 1,899,309.37**	**$ -**